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| APPLICATION NO. | FILING DATE | FIRST NAMED INVENTOR | ATTORNEY DOCKET NO. | CONFIRMATION NO. |
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| 27863 | 7590 | 06/08/2005 | EXAMINER | |
| MCNAIR LAW FIRM, PA P.O. BOX 10827 GREENVILLE, SC 29603-0827 | | | GEHMAN, BRYON P | |
| | | | ART UNIT | PAPER NUMBER |
| | | | 3728 | |

DATE MAILED: 06/08/2005

Please find below and/or attached an Office communication concerning this application or proceeding.

SP

Office Action Summary

Application No.

10/719,779

Applicant(s)

TOMPKINS, JANET

Examiner

Bryon P. Gehman

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-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --**Period for Reply**

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If the period for reply specified above is less than thirty (30) days, a reply within the statutory minimum of thirty (30) days will be considered timely.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

- 1) ☒ Responsive to communication(s) filed on 09 May 2005.
- 2a) ☐ This action is **FINAL**. 2b) ☒ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

- 4) ☒ Claim(s) 1-20 is/are pending in the application.
- 4a) Of the above claim(s) _____ is/are withdrawn from consideration.
- 5) ☐ Claim(s) _____ is/are allowed.
- 6) ☒ Claim(s) 1-20 is/are rejected.
- 7) ☐ Claim(s) _____ is/are objected to.
- 8) ☐ Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on _____ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. § 119

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some * c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
 2. ☐ Certified copies of the priority documents have been received in Application No. _____.
 3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).
- * See the attached detailed Office action for a list of the certified copies not received.

Attachment(s)

- | | |
|--|---|
| 1) <input checked="" type="checkbox"/> Notice of References Cited (PTO-892) | 4) <input type="checkbox"/> Interview Summary (PTO-413) Paper No(s)/Mail Date. _____ |
| 2) <input type="checkbox"/> Notice of Draftsperson's Patent Drawing Review (PTO-948) | 5) <input type="checkbox"/> Notice of Informal Patent Application (PTO-152) |
| 3) <input type="checkbox"/> Information Disclosure Statement(s) (PTO-1449 or PTO/SB/08) Paper No(s)/Mail Date _____ | 6) <input type="checkbox"/> Other: _____ |

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1. The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

2. Claims 1-5, 7, 9, 11-13 and 18-19 are rejected under 35 U.S.C. 103(a) as being unpatentable over Armstrong (priority of the printed publication being October 5, 1998, the date applicant Armstrong filed the original disclosure pertinent to the instant claims, as disclosed by the publication with respect to application 09/166,554) in view of any one of Woodson (3,083,821), Melnick (3,547,658) and Muni (6,708,822). Armstrong discloses a barium swallowing kit including a primary container (1) containing a plurality of individual food containers (2-5) each including a measured amount of a liquid or solid food of differing consistency already mixed with barium sulfate to provide variety for testing swallowing. Woodson, Melnick and Muni each disclose providing a kit of testing materials with the constituents not yet mixed. To modify the kit of Armstrong employing the subsequent mixing disclosed by any one of Woodson, Melnick and Muni as opposed to premixing of the constituents would have been obvious in order to keep the constituents in a non-mixed state until ready for use.

As to claim 2, the claimed size of the food containers is similar in size to retain the amount (250 mL) of food disclosed by Armstrong.

As to claim 3, Armstrong discloses each container comprising a food reservoir and a removable lid.

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As to claims 4, 13 and 19, Armstrong discloses a ratio of 20-40%.

As to claim 5, any one of Woodson, Melnick and Muni discloses a powder form.

As to claim 7, Armstrong discloses a spoon (8a-b).

As to claim 9, Armstrong discloses a straw (7a-d).

As to claim 11-12 and 18, Armstrong discloses liquid foods of different consistency and solid foods of different consistency.

3. Claims 1-5, 8, 11-13 and 18-19 are rejected under 35 U.S.C. 103(a) as being unpatentable over Robbins (6,461,589) in view of any one of Woodson, Melnick and Muni. Robbins discloses a barium swallowing kit including a plurality of individual food containers (described first through third containers) each including a measured amount of a liquid and a solid food (column 2, lines 8-20) of differing consistency already mixed with barium sulfate to provide variety for testing swallowing. Woodson, Melnick and Muni disclose providing a kit of testing materials in a primary container with the constituents not yet mixed. To modify the kit of Robbins employing the primary container and subsequent mixing disclosed by any one of Woodson, Melnick and Muni as opposed to premixing of the constituents would have been obvious in order to better store and organize the kit and keep the constituents in a non-mixed state until ready for use. To employ the gamut of food consistencies from liquid to solid is disclosed by Robbins and the particular consistencies chosen would have been an obvious matter of choice and degree to one of ordinary skill in the art.

As to claim 2, the claimed size of the food containers is of a size to provide a mouthful of food to adequately provide the test.

As to claim 3, each container comprising a food reservoir and a removable lid would have been obvious to one of ordinary skill in the art.

As to claims 4, 13 and 19, Robbins discloses a ratio within the claimed 20-60% ratio.

As to claim 5, any one of Woodson, Melnick and Muni discloses a powder form.

As to claim 8, Woodson further discloses a spatula (16) employed for mixing in a kit.

As to claim 11, to employ a particular number of food containers and corresponding particular variation of food consistencies would have been within the level of ordinary skill in the art, as more variations would provide a more complete sample of swallowing actions.

As to claim 12 and 18, Robbins discloses liquid foods of different consistency and solid foods of different consistency.

4. Claims 1-3, 5, 8, 11-12 and 18 are rejected under 35 U.S.C. 103(a) as being unpatentable over Tymchuck (5,976,084) in view of any one of Woodson (3,083,821), Melnick (3,547,658) and Muni (6,708,822). Tymchuck discloses a barium swallowing kit including a plurality of individual food containers (column 4, lines 24-48) of foods of differing consistency (see column 3, line 66 through column 4, line 6) including a measured amount of a liquid food in one container and a measured amount of solid

food in another already mixed with barium sulfate to provide variety for testing swallowing. Woodson, Melnick and Muni disclose providing a kit of testing materials in a primary container with the constituents not yet mixed. To modify the kit of Tymchuck employing the primary container and subsequent mixing disclosed by any one of Woodson, Melnick and Muni as opposed to premixing of the constituents would have been obvious in order to better store and organize the kit and keep the constituents in a non-mixed state until ready for use. To employ the gamut of food consistencies from liquid to solid is disclosed by Tymchuck and the particular consistencies chosen would have been an obvious matter of choice and degree to one of ordinary skill in the art.

As to claim 2, the claimed size of the food containers is of a size to provide a mouthful of food to adequately provide the test.

As to claim 3, each container comprising a food reservoir and a removable lid would have been obvious to one of ordinary skill in the art.

As to claim 5, any one of Woodson, Melnick and Muni discloses a powder form.

As to claim 8, Woodson further discloses a spatula (16) employed for mixing in a kit.

As to claim 11, Tymchuck discloses employing four containers and food consistencies (see column 4, lines 24-48). To employ a particular number of food containers and corresponding particular variation of food consistencies would have been within the level of ordinary skill in the art, as more variations would provide a more complete sample of swallowing actions.

As to claim 12 and 18, Tymchuck discloses liquid foods of different consistency and solid foods of different consistency.

5. Claims 6, 10 and 14 are rejected under 35 U.S.C. 103(a) as being unpatentable over Armstrong as applied to claims 1 and 12 above, and further in view of Jacobssen (4,985,232). Jacobssen discloses a mixing kit including a napkin (30 or 32) and instructions (claim 5). To modify the prior art kit further employing these teachings would have been obvious in view of their suggestion as presented by Jacobssen for reasons intended.

6. Claims 6-7, 10, 14-16 and 20 are rejected under 35 U.S.C. 103(a) as being unpatentable over either Robbins or Tymchuck as applied to claims 1 and 12 above, and further in view of Jacobssen (4,985,232). Jacobssen discloses a mixing kit including a spoon (34), napkin (30 or 32) and instructions (claim 5). To modify the prior art kit further employing these teachings would have been obvious in view of their suggestion as presented by Jacobssen for reasons intended.

As to claims 15-16 and 20, Woodson further discloses a spatula (16) employed for mixing in a kit.

7. Claim 9 is rejected under 35 U.S.C. 103(a) as being unpatentable over either Robbins or Tymchuck as applied to claim 1 above, and further in view of Greene (3,773,243). Greene discloses employing a straw (18) in consuming barium swallow

material from a container. To further modify the kit of either one of Robbins or Tymchuck employing a straw would have been obvious in view of Greene in order to facilitate consuming of the liquid food including barium, as suggested by Greene.

8. Claim 17 is rejected under 35 U.S.C. 103(a) as being unpatentable over the art as applied to claim 12 above, and further in view of Whitcher et al. (4,195,059).

Whitcher et al. disclose providing instructions directly on a container. To further modify the kit employing instructions disposed directly on the kit as taught by Whitcher et al. would have been obvious in order to reduce the components from including a separate sheet of instructions.

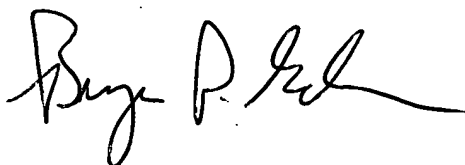
9. Applicant's arguments with respect to claims 1-20 have been considered but are moot in view of the new ground(s) of rejection. Robbins and Tymchuck do indeed suggest solid foods to be used in their testing kits. The Armstrong reference, with respect to the common subject matter of 09/166,554, has an effective date under 102(e) of October 5, 1998 and will remain as a reference. Armstrong, by disclosure in the published application, filed the subject matter common with application serial number 09/166,554 on October 5, 1998 and has right of priority of the common subject matter back to that date.

10. This action is made non-final in view of the new grounds of rejection.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Bryon P. Gehman whose telephone number is (571) 272-4555. The examiner can normally be reached on Monday through Wednesday from 5:30am to 6:00pm.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Mickey Yu, can be reached on (571) 272-4562. The fax phone number for the organization where this application or proceeding is assigned is 703-872-9306.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free).



Bryon P. Gehman
Primary Examiner
Art Unit 3728

BPG